No. 84-861

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

*v.*

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF OF RESPONDENT AMERICAN WAREHOUSEMEN'S ASSOCIATION IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

As applied to traditional functions of public warehouses in handling shipments, was the National Labor Relations Board correct in concluding that the Rules On Containers which divert such work from warehouses lack a valid work preservation objective and constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act?

## PARTIES TO THE PROCEEDING

In addition to the National Labor Relations Board and the International Longshoremen's Association, AFL-CIO, the following were parties: Council of North Atlantic Shipping Associations; ILA Hampton Roads District Council; ILA Atlantic Coast District Council; ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; Marine Terminals, Inc.; American Trucking Association, Inc.; Tidewater Motor Truck Association; New York Shipping Association; International Association of NVOCCs; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; International Container Express, Inc.; Houff Transfer, Inc.; International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; American Warehousemen's Association; and San Juan Freight Forwarders, Inc.



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### OPINIONS BELOW

The opinion of the court of appeals is reported at 734 F.2d 966. The decision and order of the National Labor Relations Board and the decision of the administrative law judge are reported at 266 N.L.R.B.230.

### JURISDICTION

The judgment of the court of appeals was entered on May 9, 1984. A petition for rehearing was denied on July 31, 1984. On January 21, 1985, the Petition of the National Labor Relations Board for a Writ of Certiorari was granted. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents-

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is-

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing ***.



Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void ***.

## STATEMENT OF THE CASE

The concept of freight containerization as a system designed to eliminate inefficiencies was introduced in the late 1950's. Instead of loading individual shipments aboard a ship, many separate shipments could be loaded at point of manufacture or storage into a single container which would then be handled mechanically from origin to ultimate destination. No intermediate manual freight handling was required.

The result of containerization was a reduction in the volume of cargo to be loaded into the holds of ships by longshoremen. Labor problems were thus precipitated and culminated in the negotiation of the Rules on Containers which essentially provided that if containers owned or leased by the shipping companies were to be stuffed or stripped within a 50 mile radius of a port by anyone other than employees of the beneficial owner of the cargo such work had to be done at the pier by ILA labor, except for import containers loaded only with goods owned by one shipper and warehoused for at least 30 days.

When initially considered, the NLRB held that the Rules violated the NLRA's proscriptions against secondary activity. In *NLRB* v. *International Longshoremen's Ass'n,* 447 U.S. 490 (1980) a sharply divided Court concluded that the NLRB's definition of the work in controversy "reflect(ed) a fundamental misconception of the work preservation doctrine" and was consequently "erroneous as a matter of law." 447 U.S. at 507, 511 n.26. The case was remanded with instructions to the NLRB to reconsider the unfair labor practice complaints in light of the principals set forth by the Court.

The Chief Justice, joined by three Justices, dissented, expressing the view that the Rules, in seeking to control the stuffing and stripping of containers away from the pier, were invalid under sections 8(e) and 8(b)(4)(B) of the NLRA.



On remand the NLRB found that the Rules sought to preserve work for longshoremen which was historically and functionally related to their traditional, pre-containerization work. Also, the shipping companies had the right to control who loaded freight into their containers. Consequently, the Rules were acceptable work preservation measures and not in violation of the secondary boycott provisions of the NLRA.

The work preservation justification for the Rules was not, however, found applicable to certain functions of public warehousemen and truckers, namely those which had traditionally been performed by warehouse and trucking labor prior to containerization.

The Fourth Circuit Court of Appeals held that the NLRB had misapplied the doctrine of work preservation in concluding that the Rules were unlawful with respect to warehousing and trucker functions, but had correctly applied the doctrine to the balance of the Rules. Thus it held that the Rules were lawful in their entirety.

## SUMMARY OF ARGUMENT

The NLRB's decision, supported by substantial evidence, correctly applies the analysis suggested by this Court, namely that the interrelated functions of the distribution industry must be considered in light of the transformation of work caused by containerization.

The NLRB correctly ruled that the longshoremen's attempt to reach work traditionally done by public warehousemen was work acquisition, not preservation.

## ARGUMENT

Public warehouses occupy a unique and necessary place in the system of distribution. The functions of the public warehouse were described in the 1929 case of *Gallagher* v. *Pennsylvania R. Co.*, 160 ICC 563-565 (1929), where the Interstate Commerce Commission stated:

> "... public warehouses are customarily used for the receipt, storage and distribution of merchandise. That these warehouses perform an important public service is undisputed. The merchandise warehouse receives goods in carloads and distributes them in smaller quantities to local jobbers or retailers, or reships them in less-than-carload lots to near-by destinations; issues negotiable and non-negotiable receipts, provides insurance, and allows credit to be obtained on merchandise stored; provides recoopering, marking, and separation of varieties and various incidental clerical services. Warehouse services enable manufacturers to keep spot stocks for their customers; equalize production by steadily absorbing the manufacturers' output while eliminating heavy investment in reserve storage space; reduce freight charges and save time in transit through handling goods in carload quantities; reduce fire risk and loss and damage claims; and eliminating the necessity of providing storage space at point of origin."

A more recent textbook, one of the standards in the field of distribution, Bowersox, Smykay & LaLonde, *Physical Distribution Management,* page 255, (rev. ed. 1968), describes the function of the merchandise warehouse as follows:

> "The distribution warehouse contains goods on the move. Because the operation is essentially a breakbulk and regrouping procedure, the objective is to effectively move large quantities of products and customize orders of products out of the warehouse."

With respect to the goods moving as containerized freight these traditional warehouse functions continue to be performed. As found by ALJ Harmatz:



> Prior to containerization, import cargo would be picked up at the piers by common carrier, delivered to a warehouse, where a trailer or truck would be unloaded, with the cargo stored, segregated, palletized, and placed in a designated storage area. Depending upon the consignee's needs, the cargo would be removed from the warehouse, distributed, or delivered. Thus, the public inland warehouse has always provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand.
>
> To this extent, warehousing practices did not change after containerization. Instead of stripping truck-trailers upon arrival at the warehouse docks, the container was stripped. In this sense, the container afforded no change in the warehousemen's method of handling inbound freight, but simply reflected a change in equipment through which the truck-trailer was supplanted by the container. (Pet. App. pg. 138a)

The ALJ similarly recognized the type of warehouse functions traditionally performed with respect to export shipments.

> Such an exception is evident in the historic operations of Mahon Express, Inc. Mahon for many years has provided warehousing services for certain retail chain stores, including Woolworth, K-Mart and Kreske, which have retail outlets in the Caribbean. These retail chains obtain their inventories from a variety of manufacturers. Instead of maintaining a private warehouse for receipt of such deliveries, insofar as destined for the Caribbean these chains directed their suppliers to deliver to Mahon. The goods were segregated by Mahon and ultimately loaded into trailers prior to containerization for the delivery to the pier. Subsequent to containerization, Mahon's employees stuffed the cargo into containers for delivery to the pier. A further exception appears in testimony of Poul Rosander pertaining to the stuffing of books and magazines, requir-

ing special processing at the warehouse operated by Wilson Container Co., Inc. See footnote 46, *supra*. Application of the Rules on Containers to such services would transcend any legitimate claim of work preservation. The service provided by Mahon and Wilson, though involved with exports, is an incident of traditional shore-side services, conventionally available through inland warehouses, which is not an essential preliminary maritime service. The ILA's claim for this work by virtue of the Rules on Containers is no more in support of fairly claimable work than in the case of importation of FSL cargo for holding and distribution by a full service public warehouse located within the port area. (Pet. App. pg. 144a)

Thus the warehouse must continue to stuff and strip containers as a necessary incidence to its traditional functions. Warehouses did so prior to containerization and continue to do so with containerization.

Stuffing and stripping work was not created for warehouses by containerization. The ALJ correctly recognized that a distinction should be drawn between stuffing and stripping work that was created by containerization, and stuffing and stripping which was merely a continuation of work previously done and was a necessary, integral concomitant of such work. The traditional work of public warehousemen falls within the category of work that should not be subject to acquisition under the Rules.

The Rules as applied to such traditional warehouse functions constitute unlawful work acquisition. While the Board agreed with that conclusion it reached such a result by a somewhat different path. It concluded that since containerization had eliminated the stuffing and stripping which longshoremen would otherwise have provided, the Rules attempt to regain this unnecessary, duplicative work was unlawful work acquisition.

There is no essential dicotomy between the decisions of the ALJ and the Board. Both correctly recognized that stuffing and stripping by warehousemen in furtherance of their traditional



functions was work that predated containerization. Both correctly apply the analysis suggested by this Court.

This Court recognized that a proper analysis must take into account all of the circumstances involved including the nature of the work both before and after the innovation.

> "... more complex cases will require a broader view, taking into account the transformation of several interrelated industries or types of work; this (containerization) is such a case." *NLRB* v. *Longshoremen*, 447 US 490, (1980).

The decision of the ALJ and the Board clearly recognized the interrelated nature of the distribution industry. Containerization altered or transformed the nature of the tasks involved in the distribution chain. Intermediate stuffing and stripping of containers became unnecessary on shipments moving through public warehouses for traditional warehousing purposes. The Rules to the extent they were directed to work taken by container stations and similar entities created by containerization were found to be valid work preservation. To the extent the Rules reached beyond into the traditional work of public warehouses they were invalid work acquisition.

This analysis is based on evidence of record. It is consistent with the balancing recognized by this Court. The Board's ultimate conclusion with respect to the warehouseman's functions should be affirmed.

The Fourth Circuit refused to accept the complex analysis made by the Board. Instead the Court reasoned that stuffing and stripping was sui generis. If the Rules were valid in one respect they were valid in all respects. That approach is not consistent with the analysis of this Court.

The recognition by the Board of the complex interrelationships among the necessarily interdependent functions in the distribution system supports the imposition of limits on the reach of the Rules. To the extent they reach into the traditional public warehouse functions they go too far. They become work acquisition and extend beyond a reasonably drawn line.

## CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed insofar as it finds the Rules lawful with respect to work traditionally done by public warehouses.

Respectfully submitted,

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